TEETHING PAINS AT AGE 25: DEVELOPING MEANINGFUL ENFORCEMENT OF THE NATIONAL FLOOD INSURANCE PROGRAM

I. INTRODUCTION

As the National Flood Insurance Program (NFIP, or Program) completes its twenty-fifth year of existence, it remains a program in search of a purpose. When Congress created the Program in 1968, it had two main goals: (1) to shift the cost of flood-related losses away from the general public by bringing affordable insurance to property owners in flood prone areas[1] and (2) to "guide the development of future construction where practicable away from locations which are threatened by flood hazards."[2] Although strongly criticized during its formative years, the NFIP has become one of the largest federal programs in terms of dollars ($220 billion in policies underwritten), ranking just behind Social Security.[3]

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1. *See* 42 U.S.C. § 4001(a) (1988).
2. *Id.* § 4001(e) (1988).
3. Beth Millemann, *Flood insurance only adds to the cost of hurricanes*, ST. PETERSBURG TIMES, Aug. 31, 1992, at 12A.

One might think that with so many billions of dollars at stake, the federal government would ensure strict compliance with the Program's goals and requirements. In fact, the government has tried.[4] Unfortunately, the implementing statute only encourages, rather than mandates, participation. Voluntary participation yields too few subscribers to maintain a workable base of revenue.[5] Further, there is currently no statutory provision for sanctions (other than suspension from the Program) against communities and lenders which participate in the Program but fail to require property owners to maintain flood insurance. Not surprisingly, jurisprudence of the past decade has declined to "read in" solutions which Congress has not provided.[6] Consequently, the federal government currently has no means to compel participation in the Program and virtually no recourse against those communities and individuals who participate in the Program but do not comply with its regulations.[7] As a result, the NFIP's first goal has met with only limited success.

The second goal—guiding development away from floodplains—has had almost no success at all. Even in the face of geometrically rising flood damage costs, new homeowners continue to flock to flood-prone areas.[8] Further, reducing construction in

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[4]. *See infra* notes 45-81 and accompanying text.

[5]. *See infra* notes 117-135 and accompanying text.

[6]. The "hands-off" attitude of the lower courts is possibly inspired by the U.S. Supreme Court's recent swing toward judicial conservatism. The trend toward narrowed standing is at least partially due to the attitude of some Court members that judicial activism is contrary to constitutional principles. *See especially* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983) (arguing that redress of grievances not specifically provided for by statute is properly addressed to the legislature, and not the courts). *See also* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (denying standing based on plaintiffs' failure to allege a redressable injury); Lujan v. Defenders of Wildlife, 504 U.S. __, 112 S. Ct. 2130 (1989) (denying standing due to plaintiffs' failure to show injury-in-fact); Nat'l Wildlife Fed'n v. Lujan, 497 U.S. 871 (1990) (denying standing due to plaintiffs' failure to show injury-in-fact).

[7]. The problem is certainly more complex; however, this comment addresses only the difficulties presented by the various judicial decisions. It leaves for another day such difficulties as those presented by the NFIP being a huge program overseen by too few regulators. *See, e.g.*, the discussion in Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61 (1985).

[8]. Paul Glastris and Bill Ahrens, *Noah Wouldn't Buy Here*, U.S. NEWS AND WORLD REP., June 4, 1990, at 31-34. The problem of inland floodplain development is

floodplains seems to have become an all-but-forgotten segment of the Program in federal and local regulations. Indeed, "the *only location restriction* for coastal structures under the NFIP is that they be built landward of mean high tide."[9] Thus, some critics of the Program believe that, far from alleviating flood damage costs, the NFIP actually encourages increased floodplain development and increases flood-related losses.[10] A 1982 General Accounting Office (GAO) report also supports this view.[11]

Additionally, there is much empirical evidence to support this thesis. For example, when Hurricane Andrew ripped through South Florida and Southwest Louisiana in August, 1992, it left in its wake massive destruction and equally massive flood claims. Private insurance companies originally estimated that they would pay out $7.3 billion in claims for South Florida alone.[12] Andrew's actual damage claims exceeded $15.5 billion, making it the most expensive hurricane in history.[13] These figures, staggering though they are, do not include losses covered by the NFIP or uninsured losses.[14] When the total amount of damage is calculated, the estimates range as high

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dwarfed by America's headlong rush to populate coastal regions. As of 1990, Florida alone was increasing its coastal population by more than 900 people per day. *Coastal Barrier Resources Act Amendments of 1990: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 2nd Sess. 57 (1990) [hereinafter *1990 CBRA Hearing*].

[9]. Beth Milleman & Elise Jones, *Improving the National Flood Insurance Program*, NAT'L WETLANDS NEWSL., May-June 1990, at 3 (emphasis in original).

[10]. *See National Flood Insurance Program: Hearings Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 447 (statement of Elise Jones, Coastal Barrier Project Coordinator, Nat'l Wildlife Fed'n), 436-37 (statement of Beth Millemann, Executive Director, Coast Alliance) (1989).

[11]. *See generally* GENERAL ACCOUNTING OFFICE, NAT'L FLOOD INSURANCE—MARGINAL IMPACT OF FLOOD PLAIN DEVELOPMENT—ADMINISTRATIVE IMPROVEMENTS NEEDED (1982). The report found that federal flood insurance encourages floodplain development by providing real estate developers and lending institutions with a safety net against financial losses in flood prone areas. *Id.*

[12]. Rosalind Resnick, *Storm Leaves A Lot of Suits In Its Wake*, NAT'L L. J., Sept. 21, 1992, at 8.

[13]. David K. Rodgers & Helen Huntley, *Storm Cost Ranks 4th in History*, ST. PETERSBURG TIMES, Mar. 31, 1993, at 1B.

[14]. *Id.*

as $30 billion.[15] By contrast, the damage in 1965 from Hurricane Betsy, which also ravaged the Louisiana coast, amounted to only $1 billion.[16] Damage from the same hurricane, if it had struck in 1985 instead of 1965, might have reached as much as $6.5 billion.[17]

Yet the economic costs of failing to guide development out of floodplains may well be outstripped in the long run by the environmental costs. An increasing body of evidence demonstrates the connection between increased floodplain development and environmental damage.[18] Nowhere has the connection between increased development and increased flood damage been more dramatically chronicled than in the disastrous Midwest floods of Summer, 1993.[19]

In the face of this mounting crisis the NFIP has floundered along for a quarter-century paying out claims and struggling to add more policyholders to its pitifully small base.[20] If the Program is to be effective, it must incorporate statutory language making participation and compliance enforceable, and it must begin the arduous task of "guid[ing] . . . future construction . . . away from locations which are threatened by flood hazards."[21] In the years since the Program's inception, Congress has attempted, with varying levels of success, to improve participation and compliance by means of stronger legislative provisions.[22] At present, the NFIP is just beginning to get some "teeth" with regard to enforcing compliance with its goals. Yet, if economic and environmental disaster is to be avoided, the Program must be strengthened still further.

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[15]. Clara Germani, *Insurance, US to Pay for Hurricane Cleanup*, CHRISTIAN SCI. MONITOR, Aug. 31, 1992, at 9.

[16]. Elise Jones, *The Coastal Barrier Resources Act: A Common Cents Approach to Coastal Protection*, 21 ENVT'L L. 1015, 1026 n.59 (1991) (citing D.G. Friedman, Assessment of Natural Hazard Risk to an Insurance Operation, Interamerican Re-insurance Meeting, San Juan, Puerto Rico, (May 5-8, 1985)).

[17]. *See id.*

[18]. *See infra* notes 158-91 and accompanying text.

[19]. *See infra* notes 179-90 and accompanying text.

[20]. As of 1993, the program had only 2.6 million policyholders from among a possible group of 11 million structures. Telephone conversation with Bill Zellars, Office of Public Affairs, Federal Emergency Management Agency, Washington, D.C., Feb. 19, 1993. Mr. Zellars is a Public Affairs Specialist for FEMA.

[21]. 42 U.S.C. § 4001 (1988).

[22]. *See infra* notes 83-103 and accompanying text.

This Comment addresses some of the issues that have made the NFIP what it is today, outlines the economic and environmental consequences of non-compliance with the Program, and examines the latest congressional attempts to put the NFIP on track. Part II briefly traces the history and development of the NFIP. Part III details the judicial decisions that have most affected compliance with the Program. Part IV outlines the early congressional response to these judicial decisions. Part V examines the economic and environmental consequences of the Program as it is currently implemented and details the current congressional efforts at reform. Finally, Part VI assesses the probability for passage of the latest proposed amendments and analyzes their probable effectiveness if they are enacted.

II. DEVELOPMENT OF THE PROGRAM[23]

Congress first authorized the NFIP through the auspices of the National Flood Insurance Act (NFIA or Act).[24] The NFIP is the implementation tool for the Act.[25] In its original form, the Program provided federally subsidized insurance to residents of flood-prone areas, conditioned on the communities' development of ordinances designed to minimize flood hazards for new construction in flood prone areas.[26]

Communities were slow to accept this new Program. One year after the Program began, only one community was eligible to receive flood insurance.[27] Congress responded by adding an

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[23]. Much of the background information on the NFIP for years prior to 1985 is drawn from the comprehensive article by Houck, *supra* note 7.

[24]. National Flood Insurance Act of 1968, § 1340 (codified as amended at 42 U.S.C. §§ 4001-4129 (1988 & Supp. III 1991)), enacted as part of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 572.

[25]. The NFIP is administered by the Federal Emergency Management Agency (FEMA). *See* 42 U.S.C. § 4011(a) (1988) ("[T]he Director of the Federal Emergency Management Agency is authorized to establish and carry out a national flood insurance program.").

[26]. Houck, *supra* note 7, at 69-70.

[27]. *Id.* (citing Weese & Ooms, *The National Flood Insurance Program—Did the Insurance Industry Drop Out?*, 31 CPCU J., Dec. 1978, at 192). Thus, the Program encompassed only 16 policyholders in 1969. Bill Zellars, *Affordable coverage for 11 million Americans at risk*, HAZARD MONTHLY, Feb., 1992, at 8.

"emergency phase" to the Program that enabled communities to join despite their not having promulgated the required local ordinances.[28] This action, too, was relatively ineffective in encouraging community participation in the Program.[29]

However, the arrival of Hurricane Agnes in June, 1972, spurred Congress to add incentive provisions "deliberately designed to *compel* participation in the Program."[30] Congress increased the allowable limits of insurance, but conditioned federal construction assistance for flood prone areas on the purchase of flood insurance.[31] These new incentives were strong enough to encourage more communities to actively participate in the Program. In the next five years, the number of participating communities increased from less than 2,000 to 16,000.[32] By 1990, "17,000 of the nation's 20,000 flood-prone communities" had entered the Program.[33]

Even these hopeful-sounding statistics, however, are misleading. Although nearly all the eligible *communities* are now in the Program, fewer than 25 percent of the eligible *structures* are actually covered by flood policies.[34] Although more than 11 million structures in the United States are eligible for NFIP coverage, only about 2.5 million policies are currently in force.[35] This result is due in large part to the fact that participation in the Program is only

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[28]. Houck, *supra* note 7, at 70 n.41.

[29]. *Id.* at 70. Only 1174 communities had joined the Program by June of 1972, and there were fewer than 100,000 policyholders. *Id.*

[30]. *Id.* at 70-71 (emphasis added). The new provisions were added as part of the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975 (codified in scattered sections of 42 U.S.C.).

[31]. Houck, *supra* note 7, at 70-71. "Federal assistance" included both direct federal funding and loans from any federally insured lending institution. *See* Pub. L. No. 93-234, § 102, 87 Stat. 975, 978 (codified as amended at 42 U.S.C. § 4012a).

[32]. *Id.* at 71.

[33]. Glastris & Ahrens, *supra* note 8, at 31. The number of participating communities is now approximately 18,000. Zellars, *supra* note 27, at 8.

[34]. Of the nearly 11 million eligible structures, only 2.6 million are actually covered by policies as of April, 1993. Telephone conversation with Bill Zellars, Office of Public Affairs, Federal Emergency Management Agency, Washington, D.C., Feb. 19, 1993.

[35]. Zellars, *supra* note 27, at 8.

encouraged; it is not mandated.[36] The lack of forced participation is compounded by the fact that flood insurance is a "tough sell."[37] Homeowners simply do not want the insurance, even if they have been flood victims in the past.[38] Further, "the NFIP requires only a five-day waiting period between the purchase of coverage and its effective date," thus allowing property owners to "track" approaching floodwaters and purchase insurance at the last minute.[39]

In its 1973 amendments to the Program, Congress explicitly recognized the difficulty of imposing flood insurance on reluctant communities and property owners. The amendments, therefore, sought to compel increased participation.[40] Under the revised version of the Program, no federal construction assistance could be obtained in flood-prone areas unless the borrower also purchased flood insurance.[41] This requirement forced communities to participate in the Program as well.[42] The amendments, however, were met with some criticism[43] and, as discussed *infra*,[44] a constitutional challenge.

III. THE JUDICIAL DECISIONS

When Congress amended the NFIA to require the purchase of flood insurance as a condition of receiving federal construction

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[36]. *See* 42 U.S.C § 4011(a) (1988) (stating that the FEMA shall establish a national flood insurance program that "will enable *interested persons* to purchase insurance against loss" (emphasis added)).

[37]. *See* Robert Ross, Jr., *Apathy Makes Flood Insurance Tough Sell*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Apr. 25, 1988, at 80.

[38]. *See id.*

[39]. Colleen Mulcahy, *Floods Test Risk Management Planning*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Aug. 23, 1993, at 1.

[40]. *See supra* notes 30-31 and accompanying text. In the Senate report on the amendments, Congress noted that "without mandating provisions to bring about [participation], no real accomplishment could be expected." S. REP. NO. 583, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 3217, 3220. *See also* Houck, *supra* note 7, at 71.

[41]. S*ee* 42 U.S.C. § 4012a (1988).

[42]. Houck, *supra* note 7, at 71.

[43]. *See, e.g.*, Barry L. Myers, *The Flood Disaster Protection Act of 1973*, 13 AM. BUS. L.J. 315, 316 (1976) (arguing that the encouragement aspect of the program had been subverted to one of "requirement.")

[44]. *See infra* notes 45-49 and accompanying text.

assistance, a group of property owners, along with several state and local governments, responded with a lawsuit attacking the constitutionality of the Act.[45] In *Texas Landowner's Rights Association v. Harris*, a federal district court considered and rejected plaintiffs' claims that the Program violated their rights under the Fifth and Fourteenth amendments.[46] Plaintiffs alleged, *inter alia*, that the denial of federal funding and assistance to communities and individuals who did not participate in the Program effected a taking of their property without just compensation.[47] The court found, instead, that participation in the Program was voluntary, rather than mandatory and, therefore, no taking had occurred.[48] Although the court's decision ensured the viability of the Program, the finding of voluntary participation was to be a mixed blessing at best. In short, the voluntary nature of the NFIP meant that the federal government could not use the Program to directly interfere with local floodplain zoning.[49]

In 1983, the Third Circuit Court of Appeals decided *Cape May Greene v. Warren*,[50] a case which solidified the NFIP's "encouragement rather than mandate" status and effectively cut off collateral federal intervention in local floodplain zoning. In *Cape May*, the EPA had conditioned a grant of construction funds for a sewage treatment plant on the community's agreement not to permit any hookups to proposed new homes in the flood-prone community.[51] The plant was supposed to serve the seaside community of Cape May City, New Jersey.[52] The state's coastal management plan generally discouraged development in flood-hazard areas,[53] but the state Department of Environmental Protection issued a construction permit

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[45]. Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1027 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 927 (1979). Plaintiffs were "the state of Missouri, 40 political subdivisions in 12 states, and 30 individual landowners and associations of landowners within federally designated flood zones." *Id.*

[46]. *Id.* at 1026-27.

[47]. *Id.*

[48]. *Id.* at 1032.

[49]. *See infra* notes 61-81 and accompanying text.

[50]. 698 F.2d 179 (3rd Cir. 1983).

[51]. *Id.* at 181.

[52]. The Cape May region is bordered by the Atlantic Ocean on the east and south, by Delaware Bay on the west, and by Cape May Harbor on the north. *Id.*

[53]. *Id.* at 191.

as an exception,[54] based on its finding that "all structures would be elevated one foot above base flood level and would not increase flood damage potential by obstructing flood waters."[55] EPA denied the sewage plant's construction permit.[56] The court found EPA's action to be arbitrary and capricious,[57] in part because EPA was "using its power . . . to accomplish matters not included in"[58] its authority under the Clean Water Act—namely, guiding new construction away from flood prone areas, as per the second goal of the NFIP. The court also placed heavy emphasis on the fact that "the approach" of the Coastal Zone Management Act,[59] on which EPA based its decision, "is one of encouragement, rather than mandate."[60]

In *Mid-America Nat'l Bank of Chicago v. First Savings & Loan Ass'n of South Holland*,[61] a small group of home buyers[62] sued their mortgage lenders, alleging that the lenders had violated section 4104a of the NFIP by failing to inform them of the flood risk associated with their homes.[63] The plaintiffs also alleged that the lenders had violated section 4012a(b) of the NFIP by failing to require purchase of flood insurance as a condition of making the home loans.[64] The defendant lenders moved to dismiss the case for

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[54]. *Id.* at 181.

[55]. *Id.* at 192.

[56]. *Id.* at 182.

[57]. *Id.*

[58]. *Id.* at 187.

[59]. 16 U.S.C. §§ 1451-64 (1988 & Supp. IV 1992).

[60]. *Cape May*, 698 F.2d at 187.

[61]. 737 F.2d 638 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[62]. The group comprised five married couples suing on behalf of themselves and as a class. *See Mid-America Bank*, 737 F.2d at 639.

[63]. *See* 42 U.S.C. § 4104a (1988). This section states that

> [each] Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall . . . require such institutions, as a condition of making, increasing, extending, or renewing . . . any loan secured by improved real estate or a mobile home [and which is or will be located in a designated flood-prone area] to notify the purchaser or lessee . . . of such special flood hazards, in writing, a reasonable period in advance of the signing of the purchase agreement, or other documents involved in the transaction.

Id.

[64]. *See* 42 U.S.C. § 4012a(b) (1988). This section requires that

lack of standing.[65] Defendants based their dismissal request on the theory that "no implied right of action exists under the Flood Program which would allow borrowers to sue their mortgage lenders."[66] The district court granted the motion and plaintiffs appealed. The Seventh Circuit, relying on the test articulated by the U.S. Supreme Court in *Cort v. Ash*,[67] affirmed and found that the two named sections of the NFIP do not give rise to an implied right of action by borrowers against their lenders.[68] Thus, the Seventh Circuit's decision in *Mid-America Bank* further eroded opportunities for enforcing NFIP guidelines and foreshadowed the Fifth Circuit's holding in *United States v. Parish St. Bernard*.[69]

Finally, in 1985, the Fifth Circuit Court of Appeals[70] turned away the federal government's direct attack on local community non-compliance. In *United States v. Parish of St. Bernard*,[71] the United

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> [e]ach federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall . . . direct such institutions not to make, increase, extend, or renew . . . any loan secured by improved real estate or a mobile home located or to be located [in a designated flood-prone area where flood insurance is available] unless the building or mobile home . . . securing such loan is covered for the term of the loan by flood insurance.

Id.

65. *Mid-America Bank*, 737 F.2d at 639.

66. *Id.*

67. 422 U.S. 66 (1975). Cort v. Ash put forth a four part test to determine whether an implied right of action exists: "(1) whether the plaintiff is a member of the class for whose 'especial benefit' the statute was passed; (2) whether there is any indication of legislative intent, explicit or implicit, either to create a private right of action or to deny one; (3) whether a private right is consistent with the underlying purposes of the legislative scheme; and (4) whether the claim is one traditionally assigned to state law so that it would be inappropriate to infer a claim based on federal law." *Mid-America Bank*, 737 F.2d at 639 (citing *Cort v. Ash*, 422 U.S. at 78).

68. *Mid-America Bank*, 737 F.2d at 640. In making their decision, the Seventh Circuit followed the guidance of essentially similar decisions in the Fourth, Fifth, and Eighth Circuits. *Id.* *See* Hofbauer v. Northwest National Bank of Rochester, 700 F.2d 1197 (8th Cir. 1983); Arvai v. First Federal Savings & Loan Association, 698 F.2d 683 (4th Cir. 1983); Till v. Unifirst Federal Savings & Loan Association, 653 F.2d 152 (5th Cir. 1981).

69. 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986).

70. For a complete analysis of the Fifth Circuit decision and those of the lower courts, see Houck, *supra* note 7, at 142-56.

71. 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986).

States[72] alleged that local communities[73] had violated "their contractual and regulatory obligations to adopt and enforce flood control measures consistent with the parishes' participation in the NFIP."[74] The court entertained three government causes of action: an implied right of action under the NFIA, a claim in contract, and a government right of subrogation to its insured's claims.[75] Relying on *Cort v. Ash* as did the Seventh Circuit in *Mid-America Bank*, the court found that the NFIA did not give the government an implied right of action.[76] The court also denied the government's contract claim, reasoning that Congress "failed to make clear in either the statute or regulations that participation in the NFIP created a contract."[77] The court upheld the government's subrogation right, however, finding that the right was "within the framework contemplated by Congress."[78] In dictum, the court also implied that in certain "very narrow" circumstances, the government might have a direct action against communities for fraud.[79]

The court's decision in *Parish of St. Bernard* left the federal government with only two avenues for enforcement, both of which seem destined for oblivion. The subrogation action is both difficult to

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[72]. *Id.* at 1119. The plaintiffs were the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administrator (FIA), and the present and former administrators of the NFIP.

[73]. The government originally filed suit against "Jefferson Parish, St. Bernard Parish, several local agencies including police juries and levee districts, and a number of private developers, contractors, engineers, and surveyors." Houck, *supra* note 7, at 143. The claims against the private parties were eventually dropped. *Id.* at 143 n.474.

[74]. *Parish of St. Bernard*, 756 F.2d at 1119.

[75]. *Id.* at 1121-24.

[76]. *Id.* at 1121-23.

[77]. *Id.* at 1121. The Court based its denial of the contract claim on Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (No contract arises between federal and state government where the state government "is unaware of the conditions or is unable to ascertain what is expected of it.").

[78]. U.S. v. Parish of St. Bernard, 756 F.2d at 1126. Subrogation occurs when the person entitled to pursue a lawful claim assigns that right to a third party. *See* BLACK'S LAW DICTIONARY 1427 (6th ed. 1991). In the insurance context, "[i]nsurance companies . . . generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued." *Id.*

[79]. *Id.* at 1128.

maintain and economically unworthy of pursuit.[80] The action for fraud "may turn out to be no less difficult to prove," and is, in any case, limited to property owned and insured by the community, which again leaves little worth pursuing.[81] No further cases have been brought on the grounds advanced in *Parish of St. Bernard*.

Thus, the court's decision in *Parish of St. Bernard* effectively placed the final nail in the government's enforcement coffin. *Texas Landowners* affirmed the constitutionality of the NFIP, but it did so at the cost of paving the way for later decisions denying any private right of action. The decision in *Cape May Greene* precluded collateral enforcement of the NFIP's goal of guiding new development away from floodplains. *Mid-America National Bank* and its related jurisprudence[82] effectively cut off actions brought by affected borrowers against recalcitrant lenders. Finally, *Parish of St. Bernard* denied the federal government any direct action against non-complying communities in all but the most narrow circumstances. These decisions set the stage for Congress to apply more "stick" in order to make the "carrot" more acceptable.

IV. THE EARLY CONGRESSIONAL RESPONSE

In 1988, Congress enacted a provision designed to encourage enforcement of the NFIP goal of guiding development away from flood-prone areas. It authorized the Federal Emergency Management Agency (FEMA) to provide funds for removal of threatened or damaged structures from erosion-hazard areas.[83] The measure provided funds for relocation or demolition of structures which were covered by flood insurance and which had been damaged either substantially or repetitively.[84] This section was similar to § 1362

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[80]. Houck, *supra* note 7, at 156. The government would not only have to prove negligence and causation on the part of the parish, but would also have to come up with enough individual claimants to make the recovery from such a suit worth pursuing. *See id.*

[81]. *Id.*

[82]. *See supra* note 68.

[83]. 42 U.S.C. § 4013(c) (1988).

[84]. To be eligible, a structure had to covered by flood insurance and meet at least one of the following: damages equal to 25 percent or more of its value at least three times in five years; single occurrence damage of 50 percent or more of its value; or be declared irreparably damaged due to the strictures imposed by another ordinance or

(enacted in 1980), which authorized FEMA to purchase flood-insured properties that had sustained heavy or repetitive flood damages.[85]

From 1980 to 1988, FEMA purchased 1257 such properties at a total cost of $36 million.[86] The new section (1306(c)), however, "has not functioned as envisioned or intended."[87] Congress found that there was a clear preference among property owners to opt for demolition, rather than relocation. This choice was "more costly than relocating structures."[88] Additionally, it became obvious to Congress that greater participation in the Program was necessary if it was to survive,[89] and that the lion's share of claim losses were being paid to repeat claimants.[90] Clearly, the Program needed to be reworked if its goals were to be met.

Consequently, when the Program came up for reauthorization in 1991, the House overwhelmingly passed a bill[91] designed not only to increase participation and compliance, but also to provide some enforcement provisions for the federal government to employ. First, House Bill 1236 would have broadened the scope of lending institutions that were prohibited from making or renewing loans on structures not covered by flood insurance.[92] The proposed new coverage would have prohibited any lending institution, not just federal loan agencies or federally insured banks, from making or renewing such loans.[93] This measure would "result in a more

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regulation. Significantly, the criterion most often used by FEMA was that of repetitive damage. GENERAL ACCOUNTING OFFICE GAO/RCED-88-155FS, FLOOD INSURANCE: STATISTICS ON THE NATIONAL FLOOD INSURANCE PROGRAM, 1988, at 15 [hereinafter GAO STATISTICAL REPORT].

85. 42 U.S.C. § 4103 (1988).

86. GAO STATISTICAL REPORT, *supra* note 84, at 15.

87. H.R. 1236, 102nd Cong., 1st Sess. § 2(23).

88. *Id.*

89. *See id.* § 2.

90. *Id.* § 2(17). Congress found that repeat claims involved only 2 percent of the total insured properties, but accounted for 32 percent of the total losses. *Id.*

91. *Id.* The bill passed 338-18. It also included sweeping changes in its mitigation provisions and raised the level of insurance available. *See* Millemann, *supra* note 3, at 12A.

92. *Id.* § 201. The provision was not retroactive. *See* § 201(b)(1).

93. The current legislation only covers lending institutions that are subject to federal "supervision, approval, regulation, or insur[ance]." *See* 42 U.S.C. § 4012a(b) (1988). The proposed legislation provided in addition that "[t]he Secretary of Housing and Urban

comprehensive flood-risk insurance Program."[94] Yet this provision, by itself, would certainly not be enough to make any significant change since, up to this point, there was no way to enforce any of the Program's provisions, other than through suspension. The goal, however, was increased participation, not suspension. Thus, some means of enforcement was needed.

Congress therefore included the second important new provision, "section 204."[95] This new section provided, for the first time, specific penalties for non-compliance with the NFIP. It mandated a fine of "not more than $350" per violation for any lending institution that followed "a pattern or practice" of not notifying real estate buyers of flood risk and/or not requiring flood insurance on those structures which were at risk.[96] For those areas at critical risk, the "hazardous, eroding portions of the nation's shores,"[97] the bill would provide no federal insurance at all.[98] The bill would not have prohibited development, an action which could leave the government open to 5th amendment "taking" claims;[99] rather, development would simply have to proceed without federally subsidized insurance.[100]

A counterpart bill to House Bill 1236 was introduced in the Senate in August, 1991.[101] However, it was soundly defeated, largely on the strength of lobbying by the National Association of

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Development . . . shall by regulation direct that any other lending institution may not make, increase, extend, or renew any loan secured by improved real estate or a mobile home located or to be located in an area . . . having special flood hazards and in which flood insurance has been made available." H.R. 1236, § 202(a) (emphasis added).

[94]. *Id.* § 2(8).

[95]. *Id.* § 204.

[96]. *Id.*

[97]. Millemann, *supra* note 3, at 12A.

[98]. H.R. 62, 103d Cong., 1st Sess. § 404 (1993).

[99]. Several recent Supreme Court cases have opened the door to "taking" claims based on local "no-build" regulations. *See, e.g.*, Lucas v. South Carolina Coastal Council, __ U.S.__, 112 S. Ct. 2886 (1992); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[100]. H.R 1236 § 1368(j).

[101]. *See* Millemann, *supra* note 3, at 12A.

Homebuilders and the National Association of Realtors.[102] A compromise bill introduced in June, 1992, also met with defeat.[103]

V. CURRENT CONGRESSIONAL EFFORTS

Facing reauthorization again in 1993-94, the NFIP continues its quest for compliance and participation. Three different bills were introduced from January to September, 1993. Each bill has addressed the NFIP's low participation level and increased floodplain development, albeit in different manners.

On January 5, 1993, Representative Doug Bereuter (R.- Neb.) introduced another bill to amend the Program.[104] However, Bereuter's bill was "[e]ssentially a resubmission of [H.R. 1236]."[105] It reintroduced the provision for fines,[106] the provision for including all lending institutions under the Program's umbrella,[107] and the provision for prohibiting any new insurance to be written for areas of critical concern.[108] Bereuter's bill would also have repealed section 1306(c) (the section providing funds for relocation or demolition of threatened structures).[109] In its place, the proposed bill offered new mitigation provisions designed to force homeowners to retreat from areas subject to high erosion hazards.[110] Under the Bereuter bill, "[r]elocation of erosion-prone buildings [was] *required* if cost

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[102]. *Id.*

[103]. *See* Michael Grunwald, *Flood Insurance Fight Heads For a 2nd Round*, BOSTON GLOBE, June 27, 1993, at 1.

[104]. H.R. 62, 103d Cong., 1st Sess. (1993).

[105]. Christopher B. Daly, *Federal Flood Insurance Seen by Critics as All Wet; Program Called "Subsidized Housing" for Rich*, WASH. POST, Feb. 18, 1993, at A3. The congressional findings still showed the same $400 million reserve and participation level of 1.7 million households as the 1991 bill. Current figures should have shown an approximate $18 million deficit and participation of 2.6 million. *See supra* note 20 & *infra* note 117. Thus, the congressional findings section clearly indicated that the Bereuter amendments were substantially the same as the 1991 bill. *See* H.R. 62 § 2.

[106]. H.R. 62 § 204.

[107]. *Id.* § 202.

[108]. *Id.* § 404.

[109]. *Id.* § 402.

[110]. *Id.* § 403.

effective and technically feasible."[111] Thus, Bereuter's bill incorporated many of the changes which experts say are necessary to both the continued viability of the NFIP and the protection of floodplain values.[112] It was eventually replaced, however, by a very different bill sponsored by Representative Joe Kennedy (D.-Mass.).[113]

Spurred in part, perhaps, by the multi-billion dollar flood damage in the Midwest[114] during the summer of 1993, Congress introduced two bills potentially more stringent than H.R. 62. Senator John Kerry (D.-Mass.) introduced S.1405 on August 6, 1993.[115] Representative Kennedy followed suit on September 30 with H.R. 3191, a bill closely modeled after S.1405.[116] The following subsections discuss the effects of low participation and increased floodplain development and detail the current proposed solutions to these problems.

A. Participation and Compliance

1. Effects of Low Participation

The Program's current low participation level makes it almost impossible[117] to achieve a broad enough base of policyholders to

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[111]. *Summary of the National Flood Insurance, Mitigation, and Erosion Management Act of 1993*, introduced by Congressman Bereuter 2 (Jan. 15, 1993 (on file with the *Tulane Environmental Law Journal*) (emphasis added).

[112]. *See* Millemann & Jones, *supra* note 9, at 2. Millemann and Jones suggest incorporating erosion setback lines, including consideration of sea level rise, special measures for protection of wetlands and floodplains, relocation of hazard-prone structures, and federal acquisition of flood- and hazard-prone structures. *Id.* at 3-4.

[113]. *See* BNA Daily Report for Executives (Regulation, Economics and Law), Oct. 7, 1993, at A193. Rep. Bereuter's bill was apparently replaced because it was felt that the mandatory additional mitigation insurance it called for would be so objectionable as to preclude passage of the bill. Telephone interview with Republican staff member of the House Banking Committee, Jan. 5, 1994.

[114]. On Wed., Aug. 4, 1993, the Senate approved a $5.8 billion flood-aid package for victims of Midwest flooding. Susan Hegger, *Senate OKs $5.8 billion in flood aid; Crop-loss percentage gets raise*, ST. LOUIS POST-DISPATCH, Aug. 5, 1993, at 1A.

[115]. *See House Banking Subcommittee Approves Insurance Reform Legislation*, BNA Daily Report for Executives (Regulation, Economics and Law), Oct. 7, 1993, at A193.

[116]. 61 Banking Report 13 (BNA), Oct. 11, 1993, at 570.

[117]. Actuarial soundness under this scenario is not completely impossible because if the program is lucky enough to experience a few light loss years, it can briefly show a surplus—as it did from 1987 to 1990. *See infra* notes 130-31 and accompanying text.

ensure that the Program will cover losses and expenses from its premiums (i.e., remain "actuarially sound").[118] The foundation of traditional insurance is the "Rule of Large Numbers."[119] In other words, insurers seek to sell policies to a large enough group of persons at risk so that the expected losses (claims) from the group as a whole do not exceed the amount of premiums received.[120] To do this, insurers must identify a group in which the risk of loss is sufficiently diverse.[121] In this manner, the expected loss to any one insured is less than the average premium paid.[122] However, the NFIP as currently implemented does not follow this approach because it suffers from two inter-related problems.

First, NFIP subscribers tend to be persons with a high risk of sustaining flood damage.[123] As a result, large portions of the total annual premiums paid must cover losses from repetitive damage.[124] Clearly, a program that continues to pay out to a small group far more money than it takes in[125] cannot achieve self-sustaining status:

Overall, however, the program is a losing proposition. The NFIP had a net operating deficit of $650 million for the period of 1978-1987. GAO STATISTICAL REPORT, *supra* note 84, at 10.

[118]. Saul J. Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 327-28 (1990). The traditional definition of actuarial soundness is the state where expected losses in a given risk group, plus the expenses related to the risk, do not exceed the premiums generated. *See id.* at 327. The NFIP definition of actuarial soundness, on the other hand, seeks only to "generate sufficient premiums to cover expenses and losses relative to an average historical loss year." *See id.* Under either definition, the Program fails to achieve actuarial soundness. *See infra* notes 117-29 and accompanying text.

[119]. FRANCIS D. BARRETT, JR., ATTORNEY'S GUIDE TO INSURANCE AND RISK MANAGEMENT 92 (1978).

[120]. *See id.*

[121]. *Id.*

[122]. *Id.*

[123]. *See id.* at 94.

[124]. *See supra* note 76 and accompanying text (noting that repeat claims involve only 2 percent of the total insured properties, but account for 32 percent of the total losses).

[125]. *See* Phil Linsalata and Kathleen Best, *Going Back for More; When it Floods in St. Charles County, Some Homeowners Rest Easy—They Can Dip into the Insurance Well*, ST. LOUIS POST-DISPATCH, Nov. 21, 1993, at 5 (detailing the cases of several families that have filed multiple claims in several separate years. Many of the claims have been for more than the value of the homes.); *see also* Bill Turque, et al., *On the Disaster Dole*, NEWSWEEK, Aug. 2, 1993, at 24 (describing the case of an NFIP subscriber who has paid about $6,000 in premiums over 18 years and has collected about $56,000 for four separate claims).

> Flood, as a hazard, is therefore subject to adverse selection—the situation where only the less desirable risks with higher expected losses choose to insure. The result can be a fearsome itch/scratch cycle: a poor selection of risks drives up rates, which pushes the marginal risks to either self-insure or not insure, which worsens the pool of insureds, which drives up rates even further, in an ever-escalating, never-ending cycle. Because insurance is primarily a risk-transfer mechanism, this situation undermines the very reason for the existence of insurance.[126]

Second, the Program's failure to ensure long-range fiscal viability aggravates the "adverse selection" problem.[127] Instead of working toward long-range stability, the Program merely attempts to ensure that premiums paid in an average year will equal the expenses and losses in the same year.[128] Consequently, a non-average year has the potential to wipe out any gains made over a period of several years and even to put the program into a deficit situation for several following years.[129] This process was dramatically demonstrated in 1992 and 1993.

Due to unusually low flood losses in the period from 1987 to 1990,[130] the NFIP had a surplus of approximately $400 million in 1991.[131] However, Hurricanes Andrew and Iniki alone accounted for $200 million in NFIP claim losses in 1992.[132] These two storms, along

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Regardless of the number of repeat claims, subscribers face neither premium increases nor cancellation. *See* Turque, et al., *supra*, at 24. According to Frank Reilly, deputy administrator of the Program, more than half of the $4.3 billion in claims paid since 1978 has gone to just 50,500 of the 2.6 million people insured under the NFIP. *See* Grunwald, *supra* note 103, at 1.

126. Singer, *supra* note 118, at 332.

127. *See supra* note 117.

128. *Id.*

129. FEMA estimates that a catastrophic year could cost as much as $4 billion. *See infra* text accompanying note 146.

130. *See* Jones, *supra* note 16, at 1025 n.55 (noting that the United States has experienced almost 25% fewer hurricanes from 1970-88 than the historical average).

131. *See* H.R. 62 § 2.

132. Michael L. Millenson, *High water, high cost: Rivers deal harsh fate to uninsured*, CHI. TRIB., July 15, 1993, at 1. Andrew's NFIP losses were actually smaller than they could have been, because its damages were due mainly to high winds, which the NFIP does not

with myriad "lesser" disasters, left the Program with an $18 million deficit by June, 1993.[133] Already reeling from these losses, the Program sustained another major hit in the summer of 1993 as prolonged rain in the Midwest caused massive flooding over eight states.[134] NFIP losses from the Midwest flooding "left the flood insurance fund with a [] deficit of at least $35 million,"[135] thus driving the Program ever deeper into the red. Further, the Program's deficit position came at the start of yet another potentially disastrous hurricane season.[136] Although only one major hurricane battered America's coastline in 1993,[137] much research indicates that we are entering a cycle of increased hurricane activity.[138] Consequently, increased flooding losses are virtually certain in the coming decade.

Losses not covered by NFIP premiums are paid for by taxpayers.[139] Clearly, then, the Program must bring more money if it is to succeed in shifting flood damage losses away from taxpayers. There are only two ways to achieve this goal: (1) charge higher premiums to the current subscribers, or (2) bring more subscribers into the Program.

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cover. *See* Fred Bayles, *Insurance Firms Adjust For Big Storms; Coverage: Industry Tries to Avoid Ruin by Taking Steps to Spread Risk. Insurers Try to Write Policies in Broader Geographic Areas*, L.A. TIMES, June 6, 1993, at A18.

[133]. *See* Christopher B. Daly, *Federal Flood Insurance Runs $18 Million Deficit*, WASH. POST, July 9, 1993, at A3.

[134]. *See, e.g.*, Jerry Adler, et al., *Troubled Waters*, NEWSWEEK, July 26, 1993, at 20. The affected states were Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin. *Id.*

[135]. Kathleen Best, *Senators Seek to Plug Flood Insurance Holes; 4 Million Homes Do Not Have Coverage, Federal Official Says*, ST. LOUIS POST-DISPATCH, Sept. 16, 1993, at 6A (quoting Sen. John Kerry). The total estimated property damage from this flooding is $6.8 billion. Adler, *supra* note 134, at 20. The NFIP losses are significantly lower because only about 10 percent of the eligible property owners in affected areas had purchased flood insurance. *See* Michael Clements, *Few Homeowners insured for floods*, USA TODAY, July 15, 1993, at 2B.

[136]. The hurricane season is historically considered to be from June 1 to November 30. Ruth Gastel, *Catastrophes: Insurance Issues*, INS. INFO. INST. REP., Dec. 1993, at 8.

[137]. Hurricane Emily struck the East Coast in September, 1993. Damage to Hatteras Island, North Carolina alone cost at least $10 million. *See* Linda Wertheimer, All Things Considered, Sept. 2, 1993, *available in* LEXIS, Nexis library.

[138]. *See* Jones, *supra* note 16, at 1026 (citing William Grey, Department of Atmospheric Science, Colorado State University).

[139]. *See Andrew Exposes Shaky Program*, S.F. CHRON., Sept. 1, 1992, at A14.

Raising the premium rate for current subscribers to a level that would support a self-sustained program would make NFIP premiums appear even more unattractive to potential subscribers. The current plan falls short of covering its reserves by about $300 million each year.[140] Thus, with only 2.6 million subscribers, the necessary premium would be about 35 percent higher than its current rate.[141] At that level, most people at risk would probably choose either to self-insure or to not insure at all. Therefore, the first goal can only be met if significant numbers of people participate in the Program.[142]

Certainly, an increase from 16 policy holders in 1969[143] to over 2.6 million in 1993[144] is not to be lightly dismissed. But the Program takes in only about $650 million per year in premiums with the current number of subscribers.[145] Officials at the Federal Insurance Agency (FIA), which oversees the Program, have noted that a worst-case scenario year could cost the Program between $3.5-4 billion.[146] As discussed *supra*,[147] however, even in a less than disastrous year, the Program's funds can be seriously depleted or even completely used up. Obviously, just two major hurricanes in a single year could virtually wipe out the entire claim fund.[148] Such an occurrence is not

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[140]. *See* Bayles, *supra* note 132, at A18 (statement of Frank Reilly, deputy federal insurance administrator and chief actuary).

[141]. Flood insurance currently costs about $300 per year for $85 thousand in coverage. Assoc. Press, *Here's how flood program works*, CHI. TRIB., July 10, 1993, (Home Guide) at 25. The unsubsidized rate would be about $415 per year.

[142]. *See supra* notes 119-20 and accompanying text. One of the basic principles of insurance is to spread the cost of risk among a broad group of potential victims so that the cost to any one insured is less than the cost of remaining uninsured. *See supra* notes 119-20 and accompanying text. This cannot happen if the group of insureds remains small. This is precisely the reason that private companies refused to write non-subsidized insurance. *See* Millenson, *supra* note 132, at 1.

[143]. *See* Zellars, *supra* note 27, at 8.

[144]. Assoc. Press, *Flood Insurance Program Sent Reeling Again*, July 14, 1993, *available in* LEXIS, Nexis Library, AP File.

[145]. Francis Reilly & John Herzog, *NFIP: Safe and Sound*, HAZARD MONTHLY, February 1992, at 9. Mr. Reilly is Deputy Administrator of the Federal Insurance Agency; Mr. Herzog is Special Assistant to the Administrator.

[146]. *Id.* However, the chances of experiencing such a loss are estimated at one in one thousand. *Id.*

[147]. *See supra* notes 130-36 and accompanying text.

[148]. Andrew's NFIP total was more than $140 million. Christopher B. Daly, *Flood Insurance Fund Running Dry*, WASH. POST, June 24, 1993, at A17. Hugo's NFIP losses

unlikely given the fact that flood-related disasters accounted for over 43 percent of the total presidentially declared disasters over the ten year period from 1982 to 1991.[149] Indeed, the point is even more dramatic if one considers that flood disasters accounted for 67 percent of the total presidentially declared disasters in 1991.[150]

2. Proposed Solutions

The obvious answer to bringing more subscribers into the Program is to make the insurance more difficult to refuse.[151] Each of the proposed amendments would be a good first step if enacted. First, like the Bereuter bill, H.R. 3191 would bring all lenders, not just federally regulated institutions, within the ambit of the flood insurance program.[152] Inclusion of all mortgage lenders under the NFIP umbrella would avoid the problem of borrowers selecting state-regulated banks, for example, because of a lack of flood insurance requirements. S.1405 does not include all lenders, but it does "[b]roaden[] the flood insurance requirement to include mortgages" sponsored or written by federal agencies.[153] Thus, although the Senate bill is less inclusive, it is broader than the current provisions.

Additionally, both bills would allow lenders to "force-place" flood insurance if it is required for the property and the owner has not

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topped $360 million. *See* Beatrice E. Garcia, *Floridians Expected to File $50 Million in Flood Claims*, MIAMI HERALD, Sept. 9, 1992, at C1. Thus, just two such major storms in one year would nearly eliminate the $650 million that the Program takes in each year.

[149]. Zellars, *supra* note 27, at 12.

[150]. The actual number of flooding events may be even higher, since "NFIP activities are not restricted to presidentially declared disasters." *Id.*

[151]. Presumably, flood insurance participation could not be made mandatory without subjecting the Program to takings claims. *See supra* notes 46-49 and accompanying text.

[152]. *See* H.R. 3191 § 101(9) ("'other lending institution' means any lending institution that is not subject to the supervision, approval, regulation, or insuring of any federal entity for lending regulation and that is not a Federal agency lender, but does not include institutions engaged primarily in the purchase of mortgage loans.").

[153]. S. 1405, The National Flood Insurance Reform Act of 1993, *Summary of Major Provisions*, on file with the *Tulane Environmental Law Journal*. *See also* S. 1405 § 201. The failure to include all lending institutions in its provisions may be one reason why banking industry representatives favor S. 1405 over H.R. 3191. *See House Banking Subcommittee Approves Flood Insurance Reform Legislation*, BNA Daily Report for Executives, Oct. 7, 1993, at 193A.

purchased it.[154] Finally, and perhaps most important, there is in both bills a statutory provision that allows FEMA to levy fines against non-complying lenders.[155] The individual penalty amount is small ($350 per violation), but the total amount of penalties per year that may be assessed against each institution may reach $100 thousand.[156] Thus, the intent of the amendments is unmistakable. The NFIP is getting serious about compliance and participation.

B. Increased Floodplain Development

1. Effects

Wetland areas such as floodplains were once thought to be valuable only if they were filled and put to uses such as agriculture, housing or industry.[157] But in recent years we have come to realize the far-reaching benefits afforded by such wetland areas.[158] Wetlands produce vast quantities of fish, shellfish and wildlife; provide resting, breeding and feeding areas for migratory species; maintain water quality; and—ironically—are an efficient means of controlling floods.[159]

Indeed, the 1993 NFIP amendments specifically seek to "encourage State and local governments and Federal agencies to protect natural and beneficial floodplain functions that reduce flood-

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[154]. *See* S. 1405 § 204; H.R. 3191 § 204. The amendments would allow lenders to purchase flood insurance for the property and charge any premiums to the property owners. Both bills require notice to the borrower, followed by 60 days in which borrowers may elect to purchase the insurance personally. *See* S. 1405 § 204(e); H.R. 3191 § 204(e).

[155]. S. 1405 calls for civil penalties to be assessed against any "regulated lending institution that is found to have a pattern or practice" of violations. *Id.* § 207. H.R. 3191 would provide for civil penalties to be assessed against "[a]ny regulated *or other* lending institution that is found to have a pattern or practice of committing violations." *Id.* § 205 (emphasis added).

[156]. *Id.*

[157]. Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573, 573 (1993); *see also* DAVID SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS 14 (1990).

[158]. Ogle, *supra* note 157, at 573.

[159]. *See* SALVESEN, *supra* note 157, at 14-18. "Like big sponges, wetlands slow down and absorb excess water during storms, then slowly release the stored water and thus reduce peak flows downstream . . . . Wetlands do such a good job of controlling floods that they are sometimes preferred over dams." *Id.* at 17.

related losses."[160] Yet, despite these clearly beneficial functions, floodplains are becoming increasingly populated and developed.[161] To make matters worse, inland floodplain areas are rich in nutrients, making them ideal for farming,[162] and coastal flood-prone areas are increasingly attractive to homeowners and developers alike.[163] This situation has contributed greatly to both the loss of wetlands[164] and the increase in flood damage losses.[165]

By "providing developers with a financial safety net, the NFIP [] provides an incentive to develop" in flood-prone areas.[166] Thus, rather than guiding development out of floodplains, the Program encourages further development. This encouragement has adverse economic and environmental effects, both of which are subject to downward spirals in which increased development exacerbates the particular problem, and the "solution" to the problem encourages further development.

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[160]. S. 1405 § 3. The amendments define "natural and beneficial floodplain functions" to be "(A) the functions associated with the natural or relatively undisturbed floodplain that moderate flooding, retain flood waters, reduce erosion and sedimentation, and mitigate the effect of waves and storm surge from storms, and (B) ancillary beneficial functions, including maintenance of water quality, recharge of ground water, and provision of fisheries and wildlife habitat." *Id.* § 102.

[161]. *See* Glastris & Ahrens, *supra* note 8, at 31-34.

[162]. SALVESEN, *supra* note 157, at 14. "Wetlands comprise one of the Earth's most productive natural ecosystems and can out-produce even the most groomed and pampered Iowa cornfields—which is precisely why so many have been drained for agriculture." *Id.*

[163]. *See 1990 CBRA Hearing*, *supra* note 8, at 57.

[164]. *See, e.g.,* Constance Hunt, *Returning the wetlands to the water*, CHI. TRIB., July 31, 1993, at 19 (noting that development in the Mississippi River valley has caused the loss of at least 19 million acres of wetlands).

[165]. *See* James M. Holway and Raymond J. Burby, *The Effects of Floodplain Development Controls on Residential Land Values*, 63 LAND ECONOMICS 259 (1990). "As a result of past floodplain development, floods cause approximately 200 deaths and $9 billion in property damage annually." *Id.*

[166]. *See* Milleman & Jones, *supra* note 9, at 2.

a. Development of coastal floodplains

Environmentally, we are just beginning to fully understand the negative consequences of trying to retard beach erosion and barrier island drift. The historical approach to coastal erosion protection has been to erect "structural stabilization projects, such as groins and seawalls that lead to an armoring of the coastline."[167] This approach, though, has often led to exactly the result that the NFIP seeks to avoid—the beach is lost due to efforts to save the houses built on it.[168] Instead of retreating from erosion-prone areas, however, residents obtain ever more costly "solutions" designed to slow or stop the inevitable shifting of the sands.[169] Such attempts to alter the natural development of coastal barriers have resulted in massive destruction of wetlands.[170] Another result has been increased stormwater runoff "containing petroleum-based pollution from roads, fertilizers and pesticides from lawns and golf courses, and sewage discharges and overflows."[171] Such runoff increases pollution in coastal areas—pollution which would have been filtered by natural wetlands had they not been lost to development.[172]

b. Development of inland floodplain areas

Americans have chosen to settle and farm near rivers almost since the first Europeans set foot on the rich soil of what is now Virginia.[173] Yet, rivers have an unsettling habit of overflowing their banks periodically, thus indiscriminately flooding the surrounding

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[167]. *See* Jones, *supra* note 16, at 1023.

[168]. *Id.*

[169]. *See generally* Rutherford H. Platt, *Folly Beach and Other Failings of U.S. Coastal Erosion Policy*, 33 ENV'T 7 (Nov. 1991).

[170]. Jones, *supra* note 16, at 1023 & n.46 (citing J.G. GOSSELINK, & R.H. BAUMANN, WETLAND INVENTORIES: WETLAND LOSS ALONG THE UNITED STATES (1980)).

[171]. *Id.*

[172]. SALVESEN, *supra* note 157, at 15. "[W]etlands function like kidneys, filtering out pollutants to purify water before it enters streams, lakes or oceans." *Id.*

[173]. *See, e.g.*, OLIVER PERRY CHITWOOD, A HISTORY OF COLONIAL AMERICA 65 (1948). "An expedition sent out by the Plymouth Company landed at the mouth of the Kennebec River in August, 1607. Here they built a fort which they named St. George and left forty-four men to hold it." *Id.* This expedition eventually abandoned the fort, but a second group (the London Company) settled on what is now the James River in May, 1607. The settlement became Jamestown, Virginia. *See id.* at 65-67.

countryside. Consequently, efforts to control riverine flooding followed quickly on the heels of settlement.[174] Still, expenditure of the best engineering efforts and billions of dollars has failed to tame America's rivers.[175] Instead, despite myriad dam and levee projects spanning six decades and costing nearly $25 billion,[176] both the economic losses and annual deaths attributed to inland flooding have increased steadily since at least 1925.[177]

These increased flood damages are at least partly due to the very structures put in place to control flooding.[178] First, dams, levees and other flood control structures "constrict[] the flow [of a river] to a narrow channel."[179] Constriction of the water flow increases water levels in the river,[180] which means that less water is required to cause flood-level river stages.[181] Further, when these waters do breach the levees, "inundation [is] sudden and unexpected,"[182] catching people and property unprotected.[183]

In addition, flood-control projects and related development have contributed to the loss of millions of acres of valuable

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[174]. *See, e.g.*, JOHN MCPHEE, THE CONTROL OF NATURE 32 (1989) (noting a 1724 New Orleans law requiring homeowners to erect levees along the Mississippi).

[175]. *See* Houck, *supra* note 7, at 64-67 (noting, *inter alia*, that despite spending more than $7 billion on flood control from 1936 to 1966, average annual flood damages continued to rise).

[176]. *See American Survey*: *And the waters prevailed*, THE ECONOMIST, July 17th, 1993, at 23.

[177]. Keith Smith, *Riverine flood hazard*, GEOGRAPHY, Apr. 1993, at 183 fig.1. The figures show a steady, substantial increase even when the dollar amounts are adjusted for inflation. *Id.*

[178]. *See* Houck, *supra* note 7, at 67. "[C]onstriction of the floodplain in one area will inevitably increase water stages somewhere else. The net result has been that '[e]fforts at control may, in some cases, in the end produce results worse than they were intended to cure.'" *Id.* at 67 (quoting SENATE COMM. ON BANKING AND CURRENCY, 89TH CONG., 2D SESS., INSURANCE AND OTHER PROGRAMS FOR FINANCIAL ASSISTANCE TO FLOOD VICTIMS 22 (Comm. Print 1966) [hereinafter INSURANCE AND OTHER PROGRAMS]).

[179]. Philip Williams, *We've proved that we can't conquer the river; Floods: Advocates of better zoning and building laws have new arguments against the dam-and-levee crowd*, L.A. TIMES, Aug. 6, 1993, at B7.

[180]. *See* Houck, *supra* note 7, at 67.

[181]. *See* Williams, *supra* note 179, at B7.

[182]. *Id.*

[183]. *See* Smith, *supra* note 177, at 184.

wetlands.[184] Initial development in such an area naturally begets further development.[185] Developers may first move into a flood-prone area because of the availability of flood insurance.[186] In some instances, however, development is "initiated by developers who take their profit and leave the subsequent losses to others."[187] New development, insured or not, will produce demands for greater flood control protection.[188] As the area becomes more "protected," more development takes place due to the increased perception of safety.[189] Greater development reduces the wetland area's ability to absorb floodwaters,[190] which further increases flood damages and, consequently, produces more demands for flood control works which, when built, attract more development.

2. Proposed solutions

Because of this self-perpetuating "itch-scratch" cycle, government has faced even greater difficulty in achieving the Program's second goal of keeping people away from floodplains. Two provisions of the 1993 amendments address the accomplishment this goal. First, the amendments propose to repeal sections 1362 and 1306(c), which authorized funds for the purchase of flood damaged or

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[184]. *See, e.g.,* Hunt, *supra* note 164, at 19. "The country has spent billions of dollars building drainage systems and straightening channels to convey water off of the landscape . . . . In the process, we have destroyed more than 19 million acres of wetlands in the Mississippi and Missouri basins north of St. Louis." *Id. See also* SALVESEN, *supra* note 157, at 18 (noting that most of the 11 million wetland acres lost to development between the mid-1950s and the mid-1970s were converted to farmland).

[185]. *See, e.g.*, National Wildlife Fed'n v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976) (detailing the private development that invariably accompanies construction of a major highway).

[186]. *See* Milleman & Jones, *supra* note 9, at 2 (arguing that the NFIP encourages development in floodplains by providing a financial safety net against flood losses).

[187]. Houck, *supra* note 7, at 67 (citing INSURANCE AND OTHER PROGRAMS, *supra* note 178, at 31). The Committee report describes the not-uncommon case of developers claiming that flood protection was available when, in fact, it was not.

[188]. *See* Houck, *supra* note 7, at 66 n.20 (citing INSURANCE AND OTHER PROGRAMS, *supra* note 178, at 31).

[189]. Smith, *supra* note 177, at 185. "[E]ngineering works were erroneously perceived to make floodplain areas completely safe, thereby creating a boom in land values and pressure for new development which placed ever more property at risk." *Id.*

[190]. *See* SALVESEN, *supra* note 157, at 17.

erosion threatened properties.[191] In their stead, both the Senate and House bills offer voluntary mitigation assistance to states and communities.[192] To receive mitigation assistance, the state or community must develop an approved mitigation plan that may include "elevation, relocation, demolition or floodproofing of structures," acquisition of substantially damaged properties, and technical assistance.[193]

Second, both bills would place substantial restrictions on the sale of flood insurance in erosion-prone areas. Within a 30-year erosion hazard area, no insurance would be made available for new structures.[194] Insurance would be available for additions to existing structures only if the structure remained "readily movable."[195] For areas within a 60-year erosion hazard area, insurance would not be available for any new nonresidential structures; new residential structures and additions to existing structures would be insurable only if they remained readily movable.[196] Additionally, affected lending institutions would not be allowed to "make, increase, extend, or renew . . . any loan secured by [unqualified] improved real estate" located in such an area.[197]

VI. ANALYSIS

A. Increasing Participation and Compliance

Both the House and Senate versions of flood insurance reform seem to approach the problem of low participation and lax compliance in substantially the same manner. However, the House version is at once more comprehensive and more demanding in its

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[191]. *S*ee H.R. 3191 §§ 401-402; S. 1405 §§ 404-405.

[192]. *See* H.R. 3191 §§ 403-406; S. 1405 §§ 401-403.

[193]. S. 1405 § 403(e); H.R. 3191 § 404(e).

[194]. H.R. 3191 § 407; S. 1405 § 406.

[195]. H.R. 3191 § 407(a); S. 1405 § 406(a). "Readily movable" is defined as "a small permanent structure of less than 5,000 square feet that is designed, sited, and built to accomplish relocation at a reasonable cost." H.R. 3191 § 102(a)(8).

[196]. H.R. 3191 § 407(b); S. 1405 § 406(b).

[197]. H.R. 3191 § 202(b); *see* S. 1405 § 201(a). The cited sections prohibit loans without inclusion of flood insurance in any area that has been identified as having special flood hazards. Since loans could not be made without flood insurance in place, and flood insurance would not be available in these areas, it follows that loans could not be made on unqualified structures in these areas. *See infra* notes 199-212 and accompanying text.

language. H.R. 3191 flatly prohibits affected lending institutions from making, increasing, extending, or renewing uninsured loans.[198] Further, H.R. 3191 encompasses all lending institutions, not just those that are federally run or regulated.[199] S. 1405, on the other hand, only requires that "the Federal National Mortgage Association . . . the Federal Home Loan Mortgage Corporation . . . [and] Federal agency lender[s] shall implement procedures *reasonably designed to assure*" that all loans made or purchased by such entities are covered by flood insurance.[200] S. 1405 also specifically does "not prohibit non-federally regulated lenders from making loans."[201]

Thus, the Senate version not only leaves a gap in the scope of covered institutions, it also leaves some "wiggle room" for deciding whether covered institutions have violated the terms of the legislation. This laxness of language becomes important in light of the provision for fines against any institution found to have followed "a pattern or practice" of violating the particular legislation.[202] Both bills mandate a fine of "not more than $350" per violation, but a determination of violation should be easier under the House version. It would seem, therefore, that the House version would be more effective in ensuring greater participation and compliance. Unfortunately, it will also undoubtedly be more difficult to pass, especially since some lobbying groups have already expressed a preference for the Senate bill.[203]

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[198]. *See* H.R. 3191 § 202(b).

[199]. *See id.* Lenders other than federally regulated institutions are covered under the term "other lending institution," which is defined as "any lending institution that is not subject to the supervision, approval, regulation, or insuring of any Federal entity for lending regulation and that is not a Federal agency lender." *Id.* § 101(a)(9). It should be noted, however, that the term "does not include institutions engaged primarily in the purchase of mortgage loans." *Id.* This potential loophole is only partially closed by the requirement that sellers of loans on the secondary market must notify the purchaser of any "special flood hazards." *Id.* § 206.

[200]. *See* S. 1405 § 201(a) (emphasis added).

[201]. S. 1405, The National Flood Insurance Reform Act of 1993, *Clarification of what this legislation does* not *do*, on file with the *Tulane Environmental Law Journal* [hereinafter *Clarification*].

[202]. *See* H.R. 3191 § 205; S. 1405 § 207.

[203]. *See Banking Subcommittee Approves*, *supra* note 115, at A193.

B. Decreasing Floodplain Development

The current House and Senate bills are virtually identical in their attempts to curb development in the floodplains. They differ significantly, however, from Rep. Bereuter's H.R. 62, which they replaced. Like the current proposals, H.R. 62 offered mitigation assistance to properties located in flood-prone areas. But, unlike the current proposals, H.R. 62 tied such assistance to provisions designed to ensure enforceability of the mitigation provisions.

First, section 403 provided for additional insurance to enable property owners in special flood hazard areas to mitigate their flood damages.[204] The mitigation insurance was mandatory for structures built before the community entered the "Regular Program," but optional for structures built after that time.[205] Contrary to the current proposals, however, section 403 provided for additional monies to be paid strictly for the purpose of demolishing or relocating damaged or threatened structures.[206] Under the current proposals, owners of property in imminent danger could receive mitigation assistance without having to move from their flood-prone location.[207] Thus, in areas of extreme hazard, the current proposals fall short of requiring demolition or relocation. Although this change will undoubtedly be easier to pass, it also continues the problem of allowing development to remain in areas where it is virtually certain to sustain damage.[208]

Mitigation claim payments under H.R. 62 were conditioned on the participating community's having adopted regulations prohibiting "[n]ew or substantially improved construction ...within the 30-year erosion setback" and placing severe restrictions on construction

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[204]. *See* H.R. 62 § 403.

[205]. *See id.* Participating communities are either in the Regular Program or the Emergency Program. *See* Houck, *supra* note 7, at 74-77. Once a community has joined the Regular Program, its building codes are supposed to require new construction to be built above Base Flood Elevation (BFE). *Id.* at 77. Thus, structures built post-Regular Program entry are theoretically at lower risk of flooding.

[206]. *See* H.R. 62 § 403.

[207]. *See supra* note 194 and accompanying text.

[208]. The current proposals do allow communities to opt for relocation, demolition, or acquisition. *See, e.g.*, H.R. 3191 § 404(e). These options, however, seem unlikely to be implemented in the face of citizens' demonstrated desire to remain. *See, e.g.*, Linsalata & Best, *supra* note 125, at 5. "We like it out there," [said an NFIP subscriber], "It's a challenge now." *Id.*

within the 60-year erosion setback line.[209] By contrast, the current proposals require only that a participating community have adopted an approved mitigation plan.[210]

The current proposals attempt to achieve a ban on new or substantially improved construction in erosion-prone areas by prohibiting construction without concomitant flood insurance, and simultaneously prohibiting most sales of flood insurance in erosion-prone areas.[211] Proponents of the current legislation claim that there is no constitutional difficulty with such a plan,[212] but real estate interests

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[209]. H.R. 62 § 403(c). "Community adoption of setbacks is optional, but benefits are conditioned on the setbacks (a quid-pro-quo similar to community participation in the NFIP). This *avoids direct prescription of Federal land use controls*." *Summary of the National Flood Insurance, Mitigation, and Erosion Management Act of 1993* introduced by Congressman Bereuter 2 (Jan. 15, 1993) (on file with the *Tulane Environmental Law Journal*) (emphasis in original).

[210]. *See supra* note 195 and accompanying text.

[211]. For example, H.R. 3191 § 202 prohibits lenders from making, increasing, extending or renewing loans secured by improved real estate without the property being insured against floods. H.R. 3191 § 407 prohibits the sale of flood insurance for new construction "within a 30-year erosion hazard zone." Thus, there can effectively be no new construction within a 30-year erosion zone. By contrast, H.R. 62 § 404 would have prohibited the granting of flood insurance only for any "new or substantially improved construction" located seaward of the 10-year setback line.

[212]. *See Clarification*, *supra* note 201. "Would not legislate an unconstitutional taking of private property . . . . Court decisions nationwide have affirmed [] this approach." *Id.* Unlike the "no-build" policy found by the U.S. Supreme Court to be a taking without just compensation in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2130 (1992), the policy here is to allow building—it would simply have to occur without federal assistance. *See* Daly, *All Wet*, *supra* note 105, at A3. However, several lobbying groups plan to oppose any such measures on taking grounds. *See id.* The House version may provide fertile ground for such a claim, since it would essentially prohibit new construction within a 30-year erosion zone. *See supra* note 211 and accompanying text. It is also possible that opponents of this provision who already live in a flood hazard area may bring a "taking" challenge based on their perceived entitlement to flood insurance. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970)(noting with approval that "sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials." *Id.* at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)). The *Goldberg* Court upheld plaintiffs' right to a pretermination hearing for their benefits under the federal Aid to Families with Dependent Children program. *See id.* at 264. Part of the basis for the Court's reasoning was that "[t]he constitutional challenge [to termination of benefits] cannot be answered

and homeowners alike are sure to oppose it. Both groups will oppose the measure because it implicitly imposes a "no-build" policy on some of the most sought-after property in the country—waterfront acreage.[213]

This is exactly the same type of provision which most alarmed the real estate industry in the 1991 bill.[214] What may save the current legislation is the provision allowing flood insurance for additions to existing structures within 30- and 60-year erosion zones, provided that the structure remains "readily movable."[215] Still, the provisions which effectively disallow new construction within a 30-year erosion zone are even more stringent than similar ones in the 1991 bill.[216] The industry has indicated that it will oppose such a measure again.[217] Given that it was largely real estate industry pressure that defeated the 1991 bill, it is likely that this will again be the "deal-breaker" in the 1993 bills.

Unfortunately, these measures are the most direct and effective means of targeting areas of critical concern.[218] Certainly, at least one study has shown that the land-use policies of the Program as currently implemented are having some success in moving people out of flood plains.[219] Yet, despite the improvements made to date, if the federal government is to avoid continuing to pay astronomical sums in disaster relief,[220] more immediate and direct action is necessary.

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by an argument that public assistance benefits are 'a privilege and not a right.'" *Id.* at 262 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

213. *See supra* note 8 (detailing the increasing popularity of coastal and inland floodplain property).

214. Daly, *All Wet*, *supra* note 105, at A3.

215. *See* H.R. 3191 § 407; S. 1405 § 406.

216. *See* Daly, *All Wet*, *supra* note 105, at A3.

217. *Id.*

218. *See* Holway & Burby, *supra* note 165, at 269 (finding that among various land-use controls, "[z]oning . . . had the strongest effect on land value").

219. *Id.* at 270 ("Enacting building elevation regulations which exceed NFIP minimum requirements . . . will tend to suppress floodplain development.").

220. Studies predict that the average flood damage costs per year to just coastal property will reach $5 billion by the year 2000. *See 1989 CBRS Hearing*, 101st Cong., 1st Sess. 81 (1989).

VII. CONCLUSION

As one leading commentator has noted, there are only a limited number of approaches to the flooding problem.[221] We can "(1) ignore it, (2) keep the water away from the people, (3) pay the people who get wet, or (4) keep the people away from the water."[222] Ignoring the problem will not make it go away. History has shown that we cannot effectively keep the water away from the people.[223] Paying the victims of floods is also a less viable alternative because it is expensive unless done through an effective insurance program funded by potential victims.[224] Recent changes in the Program have enabled it to operate in the black for the past few years, but it is still on very shaky ground, a Savings & Loan debacle waiting to happen.[225] Congress should pass the 1993 proposed amendments to insure greater participation and, therefore, greater Program stability.

In the long run, however, the only way to effectively and rationally reduce flood damage is to keep the people away from the water.[226] Therefore, Congress should also enact the amendments which guide development away from the floodplains. Passing these amendments may not be politically attractive, but time grows short and Congress can no longer afford not to act.

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221. Houck, *supra* note 7, at 159.

222. *Id.*

223. *Id.*

224. The NFIP had a net operating deficit of $650 million for the period of 1978-1987. GAO STATISTICAL REPORT, *supra* note 84, at 10.

225. *See* Millemann, *supra* note 3, at 12A.

226. Houck, *supra* note 7, at 159.